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No. 02-815

In the Supreme Court of the United States

CITY OF SACRAMENTO, CALIFORNIA, AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, PETITIONERS

v.

JOAN BARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a city's provision, construction, and maintenance of a system of public sidewalks for its residents is a "program or activity" subject to the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or a "service[]," "program[]," or "activit[y]" subject to the requirements of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States in this case. The position of the United States is that the petition for certiorari should be denied because the court of appeals' decision below is correct; it does not conflict with any decision of this Court or of any other court of appeals; and, in light of the interlocutory posture of this case, petitioners' policy arguments concerning the potential fiscal and administrative burdens of complying with the decision below may be addressed on remand.

STATEMENT

1. a. Congress enacted the Americans with Disabilities Act (ADA) in 1990 as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). In doing so, Congress found, *inter alia*, that "individuals with disabilities continually encounter various forms of discrimination," including "the discriminatory effects of architectural * * * barriers" and "failure to make modifications to existing facilities." 42 U.S.C. 12101(a)(5).

Title II of the ADA prohibits discrimination on the basis of disability by public entities. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

b. The ADA directs the Attorney General to promulgate regulations to implement Title II based on regulations previously developed under Section 504. 42 U.S.C. 12134. Among other things, the Title II regulations provide that individuals with disabilities shall not be "denied the benefits of the services, programs, or activities of a public entity," "because a public entity's facilities are inaccessible to or unusable by individuals with disabilities." 28 C.F.R. 35.149. The Section 504 regulations establish a similar mandate. 28 C.F.R. 41.56. Both the Title II and Section 504 regulations

define "facility" to include "roads" and "walks." 28 C.F.R. 35.104; see 28 C.F.R. 41.3(f).[1]

Under the Title II regulations, the scope of the applicable accessibility requirements depends on whether a covered facility was constructed before or after January 1992. In general, the regulations require that "[e]ach facility" that is newly constructed or altered *after* January 1992 must be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.151(a) (newly constructed facilities); 28 C.F.R. 35.151(b) (altered facilities). And, in particular, the regulations provide that newly constructed or altered sidewalks and intersections must include curb ramps. 28 C.F.R. 35.151(e).

The Title II regulations impose a more generalized standard with respect to facilities covered by the ADA that were in existence in January 1992. Rather than applying the accessibility requirements to "[e]ach facility" that is covered (28 C.F.R. 35.151(a)), the regulations provide that a "public entity shall operate each service, program, or activity, so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a) (emphasis added). In addition, the regulations further provide that, even under this "entirety" approach, a public entity is not required "to take any action that it can demonstrate would result in * * * undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3).

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[1] The ADA also directs the Attorney General to issue architectural standards for facility accessibility consistent with architectural "minimum guidelines and requirements" to be developed by the Architectural and Transportation Barriers Compliance Board (Access Board). 42 U.S.C. 12134(b), 12204(a).

The regulation governing existing facilities also provides that any "structural changes to facilities" necessary to comply with Title II were to be made in accordance with a transition plan. 28 C.F.R. 35.150(d)(1). In particular, the regulation provides that such a "transition plan shall include a schedule for providing curb ramps" on "walkways" controlled by the public entity, "giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas." 28 C.F.R. 35.151(d)(2).

2. Respondents, Sacramento residents with disabilities, brought this action against the City of Sacramento, alleging that the City has built and maintained its public sidewalks in a manner that in places renders them inaccessible to individuals with mobility and vision impairments, in violation of Title II and Section 504. In particular, respondents alleged that the City failed to install curb ramps at intersections in newly constructed or altered streets; to remove obstacles making existing sidewalks unpassable or dangerous (*e.g.*, benches, signs, and wires protruding into walkways); and even simply to develop a transition plan to address such problems. C.A. App. 12-15.

a. The parties reached a settlement on the provision of curb ramps in newly constructed or altered streets, but could not agree on the scope of the City's obligation to make accessible obstructed stretches of existing public sidewalks. Pet. App. 3a. On cross-motions for summary judgment, the district court granted partial judgment for the City on "the issue of 'program access' as it relates to sidewalks," holding "that such sidewalks are not a program, service or activity of the City of Sacramento, and thus are not subject to the program

access requirements of the ADA or Section 504 of the Rehabilitation Act." *Id.* at 9a-10a & n.1. At the same time, however, the court certified its order pursuant to 28 U.S.C. 1292(b), for an interlocutory appeal. Pet. App. 10a.

b. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-8a. The court explained that prior circuit precedent had interpreted the ADA's "services, programs, or activities" language to "bring[] within its scope 'anything a public entity does.'" *Id.* at 5a (quoting *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)). "[M]aintaining public sidewalks is a normal function of a city," the court observed, and "therefore falls within the scope of Title II" under that interpretation. *Id.* at 6a.

The court of appeals explained that its "construction of the [Title II's] phrase 'services, programs, or activities,' is supported by the plain language of the Rehabilitation Act because, although the ADA does not define 'services, programs, or activities,' the Rehabilitation Act defines 'program or activity' as 'all of the operations of' a qualifying local government." Pet. App. 6a (quoting 29 U.S.C. 794(b)). In addition, the court explained that its construction of Title II is supported by the Title II regulations. *Id.* at 7a-8a. Indeed, the court observed, the curb ramps mandated by the regulations "could not be covered unless the sidewalks themselves are covered." *Id.* at 8a. The court also pointed to the amicus brief filed by the United States in this case in support of appellees. *Id.* at 7a-8a.

The court of appeals remanded for additional proceedings concerning the scope of the City's compliance obligations under Title II and Section 504 with respect to its public sidewalk system. In particular, the court noted that, "[a]t trial, the City will have the opportu-

nity to present evidence concerning any 'undue financial and administrative burdens'" that might be imposed by the statutory accessibility requirements. Pet. App. 8a n.6.

DISCUSSION

Laying and maintaining a network of walkways, or sidewalks, for pedestrians to move about is one of the first and most elementary functions of a municipality. The court of appeals in this case held that the "public sidewalks in the City of Sacramento are a service, program, or activity" covered by Title II and Section 504. Pet. App. 2a, 8a. That decision is correct and consistent with the plain language of Title II and Section 504, a subsequent Act of Congress recognizing that "public sidewalks" are covered by the ADA, 23 U.S.C. 133(b)(3), and regulations issued by the Department of Justice. It does not conflict with any decision of this Court or of any court of appeals. And, indeed, there is no other reported decision of which we are aware addressing Title II's or Section 504's application to a city's public sidewalks. Accordingly, the customary grounds for granting certiorari are absent in this case.

Nor do the administrative or financial burdens hypothesized by petitioners and their amici of complying with Title II and Section 504 in the context of public sidewalks provide a basis for granting certiorari. Those concerns may be addressed by—and indeed are likely to be the focus of—the proceedings on remand. In remanding for further proceedings, the court of appeals specifically noted that the City may present evidence that modifying its sidewalks to comply with Title II's accessibility requirements would subject it to "undue financial and administrative burdens" that are not required under the Title II regulations. Pet. App. 8a

n.6. Presently, the record is devoid of any such evidence. The interlocutory posture of this case therefore presents an additional reason to deny review.

A. The Court Of Appeals' Decision Is Correct And Consistent With The Pertinent Statutory Provisions And Regulations

1. Both Title II of the ADA and Section 504 of the Rehabilitation Act prohibit covered public entities from denying individuals with disabilities "the benefits of" any "program" or "activity" or, in the case of Title II, any "service[]" of a covered entity on the basis of disability. 29 U.S.C. 794(a); 42 U.S.C. 12132. As this Court has recognized, those statutory terms are unambiguously broad. See *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998). Indeed, Title II was modeled on Section 504, and Section 504 states that "the term 'program or activity' means *all of the operations of*" a covered public entity. 29 U.S.C. 794(b) (emphasis added). Title II's use of "program[]" and "activit[y]" was intended to be just as broad as Section 504's use of those terms. See 42 U.S.C. 12201(a).[2]

In common parlance, Sacramento's provision of a system of sidewalks for pedestrians to move about for personal, commercial, or other reasons is a "service[]" that the City provides to its residents. Indeed, it is one of the most fundamental services provided by any municipality. The provision of that service is depen-

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[2] The dictionary definitions of the terms used by Congress confirm their breadth. "Activity" means a "natural or normal function or operation." *Webster's Third New International Dictionary* 22 (1993). "Program" means "a schedule or system under which action may be taken toward a desired goal." *Id.* at 1812. And "service" means the "supply of needs" or "utility" and "an act of administering or applying something." *Id.* at 2075.

dent on government "activities" ranging from the initial construction of the sidewalks to the maintenance of the sidewalks. And the provision of that service is undertaken as part of a "program[]" funded by the City and administered by its Public Works Department. When an individual with a disability is denied the use of the sidewalk system that Sacramento makes available to the public at large because sidewalks are inaccessible to individuals with disabilities, he or she is "excluded from," and "denied the benefits of," the "services, programs, or activities of a public entity." 42 U.S.C. 12132.

That conclusion is not nearly as startling as petitioners and their amici suggest. Providing and upkeeping a network of walkways for pedestrians to get around town is a quintessential, not to mention ages old, government service. Indeed, in other contexts, this Court itself has recognized the provision of sidewalks as an archetypal "general government service[]." *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947) (noting that there is no Establishment Clause difficulty in giving churches access to "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks"); cf. *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) (recognizing the "strong [state] interest * * * in promoting the free flow of traffic on public streets and sidewalks"). Sidewalks permit the public not only to stay clear of road traffic, but to access shops and businesses, means of public transportation, places of employment, and government offices and facilities.[3]

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[3] Sidewalks have long served an important public safety service. In earlier times, raised paths called "Side-walks" separated pedestrians from carriage ways. See *The Oxford English Dictionary* 493 (2d ed. 1989) ("The Side-walks for the Foot-passengers are

And for "time out of mind," sidewalks have been used for the purpose of public association and speech. *Boos* v. *Barry*, 485 U.S. 312, 318 (1988) (quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)).

Nor was the Congress that enacted the ADA oblivious to the natural reach of the broad terms that it used in Title II. For example, the House Report accompanying the Act explained that under Title II, "local and state governments are required to provide curb cuts on public streets" because the "employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on *and between* the streets." H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 84 (1990) (emphasis added). Similarly, hearing testimony established that one of the greatest barriers that individuals with disabilities faced in participating in the economic life of communities was the inability to use transportation systems, including sidewalks, to reach places of employment and commerce.[4]

. . . raised about a Foot above the Carriage-way.") (quoting Labelye, *Piers Westminister Bridge* 69 (1739)). Today, sidewalks separate pedestrians from automobile traffic.

[4] See, *e.g.*, *Americans with Disabilities Act of 1989: Hearings on H.R. 2273, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 248 (1989) (survey identified "availability of curb cuts" as a "major problem[]" for individuals with disabilities); *ibid.* ("[d]isabled citizens are forced to stay home or use the street, because curb cuts and sidewalks are absent or inadequate"). Similarly, Appendix C to Justice Breyer's dissenting opinion in *Board of Trustees* v. *Garrett*, 531 U.S. 356, 391-424 (2001), contains numerous examples of asserted discrimination by state and local governments concerning the condition of public sidewalks and, most notably, a lack of curb ramps, which were presented to a congressionally appointed ADA task force.

Moreover, in subsequent legislation, Congress has explicitly recognized that "public sidewalks" are covered by Title II. Section 1108 of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (23 U.S.C. 133(b)(3)), which was passed in 1998, authorizes the use of federal funds set aside for transportation improvements undertaken by the States for "the modification of public sidewalks to comply with the Americans with Disabilities Act of 1990."

Petitioners acknowledge (Pet. 6, 25) that the *construction and maintenance* of sidewalks constitutes a covered "program, service, or activity," but object (Pet. 25) that the court of appeals "did not require the City to *do* anything before its sidewalks would be deemed covered." But the application of Title II and Section 504 to public sidewalks does not turn on whether, or when, a city chooses to fill in the cracks in a particular stretch of sidewalk. More to the point, the maintenance necessary to keep the public sidewalk system functioning is not undertaken for its own sake, but only as a component of the basic government service of providing a freely and safely passable system of walkways for pedestrians in the first place.[5]

2. The court of appeals' decision is also consistent with the Title II regulations promulgated by the Department of Justice. As discussed above, those regulations provide that no one with a covered disability

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[5] Petitioners' position appears to be that basic government infrastructure, like streets and sidewalks, cannot constitute a service or activity covered by Title II, and that only the process of upkeep for such facilities may constitute such a service or activity. But, as noted above, this Court itself has recognized that the provision of, not just the upkeep of, facilities like parks, streets, and sidewalks is a "general government service[]." *Everson*, 330 U.S. at 17-18.

"shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity." 28 C.F.R. 35.149. And the regulations specifically define "facility" to include "roads" and "walks" controlled by a public entity. 28 C.F.R. 35.104.

Furthermore, the Title II regulations recognize the ADA's application to public sidewalks in particular. The regulations provide that newly constructed or altered streets and pedestrian walkways "must contain curb ramps," 28 C.F.R. 35.151(e), and require public entities with responsibility over existing sidewalks to develop a transition plan for installing curb ramps by a certain date, 28 C.F.R. 35.150(d)(2).

The fact that the regulations address only one specific aspect of sidewalk accessibility—*i.e.*, curb ramps—does not undermine the conclusion that the provision and maintenance of a sidewalk system *in general* is a covered service, program, or activity under Title II. As the court of appeals noted, the curb ramp requirements "would be meaningless if the sidewalks between the curb ramps were inaccessible." Pet. App. 7a. Moreover, if a city's system of public sidewalks were *not* a covered service, program, or activity, there would be no basis (in the ADA) for imposing *any* program accessibility requirements with respect to a city's public sidewalk network, including curb ramps.

To be clear, the Title II regulations are premised on the view that a public sidewalk system is a covered service, program, or activity under Title II. See 60 Fed. Reg. 58,462, 58,463 (1995) (observing that curb ramp requirements for existing sidewalks were premised on the view that "maintenance of pedestrian walkways by public entities is a covered program") (notice of pro-

posed rulemaking). That position, embodied in the Department of Justice's regulations implementing Title II, is entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Petitioners and their amici argue that the Title II regulations require a city to modify its public sidewalks only to the extent necessary to permit access to *other* government programs or services, such as schools or libraries. That is incorrect. Indeed, the regulations explicitly require a public entity to adopt a transition plan that prioritizes installing curb ramps not only in "walkways serving entities covered by the Act, including State and local government offices and facilities," but *also* in walkways serving "transportation, places of public accommodation, and employers, followed by walkways serving other areas." 28 C.F.R. 35.150(d)(2). Nor, as explained above, do the broad statutory terms used by Congress in Title II square with the notion that Congress intended to limit the coverage of the ADA to a haphazard patchwork of sidewalks adjacent to government buildings or facilities.[6]

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[6] Petitioners assert (Pet. 28-29) that the government's position in this case is inconsistent with informal guidance letters issued by the Department of Justice. That is incorrect; those letters, too, recognize that Title II and Section 504 extend to a municipality's public sidewalks. See, *e.g.*, Letter from S. Oneglia, Chief of Coordination and Review Section, Civil Rights Div., to P. Kelley (Feb. 17, 1994) ("[I]f a public entity has responsibility for, or authority over, sidewalks or other public walkways, it must ensure that such sidewalks and walkways meet the program access requirement and, when viewed in their entirety, are readily accessible to and usable by individuals with disabilities."); Letter from J. Wodatch, Chief of Disability Rights Section, Civil Rights Div., to R. Daniels (Apr. 8, 1996) ("residential sidewalks that are constructed with the expectation that they will be turned over to the local government

B. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals

1. Petitioners assert (Pet. 12) a conflict between the Ninth Circuit's decision below and this Court's decision in *Pennsylvania Department of Corrections* v. *Yeskey*. There certainly is no direct conflict between the cases: in *Yeskey*, this Court held only that Title II of the ADA "extends to state prison inmates." 524 U.S. at 213. Petitioners assert a much more generalized conflict, arguing that, whereas in *Yeskey* this Court "focus[ed] on the plain meaning of the statutory terms," the Ninth Circuit "expressly declined to analyze the operative language of the ADA and the Rehabilitation Act." Pet. 10, 12. That is not an accurate characterization of the Ninth Circuit's decision. Although the Ninth Circuit referred to prior circuit precedent construing "the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does,'" Pet. App. 5a, the court ultimately explained that its conclusion that "maintaining public sidewalks" is a covered service, program, or activity under Title II squares with the "plain language" of the statutory terms repeated and defined in the Section 504. *Id.* at 6a; see *ibid.*

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are required [under the ADA] to be accessible to people with disabilities"). Moreover, to the extent that petitioners believe that some informal letters support a different interpretation, the letters quoted above are only one reflection of a position that has been consistently expressed in other, more formal publications of the government, including the regulations discussed above. See, *e.g.*, 60 Fed. Reg. 58,462, 58,463 (1995) (notice of proposed rulemaking); Access Board, *Accessible Rights-of-Way: A Design Guide* 18 (1999); see also *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001).

In any event, any difference in the general interpretive approach of the cases does not provide a basis for granting certiorari. "This Court 'reviews judgments, not statements in opinions.'" *Johnson* v. *De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (quotations omitted). As explained above, the court of appeals' decision is consistent both with the text of Title II and the implementing regulations. Any statements in the decision below indicating that the Ninth Circuit has adopted an unduly expansive approach to interpreting the ADA do not alter the correctness of the result that the court reached in this case and, therefore, do not provide a basis for reviewing its decision in this case.[7]

2. Nor does the Ninth Circuit's decision conflict with the decision of any other court of appeals. Indeed, petitioners point to no other published decision addressing whether a system of public sidewalks is subject to the accessibility requirements of Title II or Section 504. And the only federal court of which we are aware that has addressed that issue specifically *agreed*—in an unpublished decision—with the Ninth Circuit's decision in this case and held that "city sidewalks, owned by the city and over which it has assumed law enforcement jurisdiction to ensure unobstructed public use, are a 'service, program or activity' within the meaning of the ADA." *Krumel* v. *City of Fremont*, No. 8:01CV259 (D. Neb. Jan. 29, 2003), slip op. 6. Particularly in light of

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[7] In fact, *Yeskey* supports the result reached by the court of appeals below. The Court in *Yeskey* observed that a "prison law library, for example, is a *service* (and the use of it an activity)." 524 U.S. at 211 (emphasis added). It would be anomalous as a matter of both statutory interpretation and common sense to conclude that the Congress that enacted the ADA intended to ensure that individuals with disabilities would enjoy access to a prison law library, but not the public sidewalks.

the unique importance that petitioners and their amici themselves attach to Title II's application to *public sidewalks*, the absence of any other reported decision addressing Title II's application to public sidewalks, much less any circuit conflict on that issue, itself counsels strongly against granting review in this case, the very first reported decision on point.

Underscoring the absence of any genuine circuit split necessitating resolution by this Court, petitioners speculate that the general interpretative approach of the Ninth Circuit in this case would lead it to hold that Title II and Section 504 apply to matters such as arrest procedures, public employment, and even proceedings involving the termination of parental rights, in conflict with the decisions of other circuits. See Pet. 13-18. There is no reason to believe that a circuit conflict on those distinct issues is inevitable.[8] But in any event, the mere prospect that a conflict *might* develop among the courts of appeals in the context of arrests, employment, or parental rights provides no reason to grant review here to consider Title II's and Section 504's application to a city's system of public sidewalks.

C. The Interlocutory Posture Of This Case Is Itself A Sufficient Reason To Deny Certiorari

Even when a threshold liability determination presents an important federal question, this Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia*

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[8] Indeed, while petitioners hypothesize (Pet. 16) that the general interpretive approach of the Ninth Circuit in this case would lead the court to hold that employment is covered by Title II, they concede that the Ninth Circuit has in fact already reached the *opposite* conclusion. *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), cert. denied, 531 U.S. 1189 (2001).

Military Inst. v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). The court of appeals below held only that the City's public sidewalks are covered by Title II and Section 504 as a threshold matter; it made no determination concerning the specific requirements that Title II or Section 504 impose on the City with respect to its public sidewalk system, nor even that the City's sidewalks are in any way deficient under Title II or Section 504. Instead, the court remanded for further proceedings concerning those key questions. Pet. App. 8a & n.6. The current interlocutory posture of this case thus provides an independent reason to deny review.

Moreover, in light of the procedural posture of the case, the policy arguments made by petitioners and their amici concerning the potential practical implications of the court of appeals' decision do not provide any reason to grant review at this time. As respondents point out (Br. in Opp. 8), "[b]ecause this case was presented on interlocutory appeal, * * * no evidence has been taken regarding what the City of Sacramento is required to do in order to provide program access to the [city's] system of public sidewalks." Nor is there any "evidence in the record regarding the exact extent of the barriers [that might violate Title II or Section 504], or the cost of removing any such barriers." *Ibid.*

Furthermore, in at least two key respects, the regulatory regime addresses the overriding financial and administrative concerns raised by petitioners and their amici. First, with respect to existing sidewalks, the Title II regulations require only that the City's *system* of public sidewalks—when viewed "in its entirety"—be generally accessible to and usable by individuals with disabilities. 28 C.F.R. 35.150(a)(1). As a result, petitioners are incorrect in stating that "Sacramento must

undertake to make *each* sidewalk accessible," Pet. 19 (emphasis added), much less that "every sidewalk * * * [in] the Ninth Circuit arguably must now be made ADA-compliant." *Ibid.*

Second, with respect to existing sidewalks, the City is not required to take any action that would result in undue financial or administrative burdens. 28 C.F.R. 35.150(a)(3); see *Olmstead* v. *L.C.*, 527 U.S. 581, 603-606 (1999). Thus, there is no reason to presume that the decision below will impose a "staggering" (Pet. 10) financial burden on Sacramento. Nor is there any basis to assume that the lower courts on remand will ignore that important regulatory safety valve and impose the sort of extravagant demands hypothesized by petitioners and their amici. See Pet. 19. Indeed, in remanding for further proceedings, the Ninth Circuit itself emphasized that the City will have an opportunity "to present evidence concerning any 'undue financial and administrative burdens'" that might be exacted by complying with Title II or Section 504. Pet. App. 8a n.6.[9]

At the same time, it is likely that many basic impediments to sidewalk access could be removed by the City at relatively small burden or expense. For example, common barriers to sidewalk access by those with disabilities include newspaper boxes, benches, or plant growth that likely could be moved to widen sidewalks to allow wheelchair access or eliminate obstacles posing

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[9] There may be other limitations on the scope of a city's obligations under Title II and Section 504 when it comes to sidewalks. For example, the Title II regulations impose accessibility requirements only with respect to sidewalks that "a public entity has responsibility or authority over." 28 C.F.R. 35.151(d)(2). Under state or local law, however, some sidewalks may be owned or controlled by a homeowners' association or the like. See, *e.g.*, Fla. Stat. Ann. § 316.00825 (West Supp. 2003).

a danger to visually impaired pedestrians without great effort or expense. In addition, in the case of obstacles that are more difficult to remove or structural flaws, a court might conclude that a city's adoption of a plan designed to address such flaws over a reasonable period of time was sufficient to comply with Title II and Section 504. Certainly, the existence of some potentially costly modifications should not provide an excuse for failing to make less costly adjustments, especially in light of the regulatory exception that exists for alterations that would entail *undue* financial burdens.[10]

Denying review of the interlocutory decision in this case will "not, of course, preclude [petitioners] from raising the same issues in a later petition, after final judgment has been rendered." *Virginia Military Inst.*, 508 U.S. at 946. Awaiting a final judgment, however, would provide this Court with a concrete record on which to evaluate the practical implications of the court of appeals' decision and, thus, a better platform from which to gauge the need for this Court's review.

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[10] To be sure, even these compliance responsibilities may impose unwelcome costs on cities with public works budgets that are already stretched thin. But in enacting the ADA, Congress made a determination that the societal benefits of promoting community access to those with disabilities outweigh the societal costs of complying with the ADA. See 42 U.S.C. 12101(a)(9); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3, at 49-50 (1990) ("While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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